



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** HME, Inc.

**File:** B-251067.2

**Date:** April 13, 1993

William E. Hughes, III, Esq., Whyte & Hirschboeck, for the protester.  
Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for Lors Medical Corporation, an interested party.  
William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency had a reasonable basis upon which to conclude that awardee whose headquarters facility was accredited met a definitive responsibility criterion requiring that a contractor be accredited to perform home oxygen services.
2. Agency reasonably based its affirmative determination of the awardee's responsibility on a plant facilities survey performed after bid opening at the firm's headquarters in conjunction with the award of a contract for similar services to those sought by the solicitation.
3. The fact that agency and the incumbent contractor agreed that the incumbent would perform phase-in house oxygen services for 1 month at the beginning of the awardee's contract does not indicate an inability on the awardee's part to successfully perform and, even if the awardee had performance problems, this does not necessarily lead to the conclusion that agency's affirmative responsibility determination was made in bad faith.

### DECISION

HME, Inc. protests the award of a contract to Lors Medical Corporation under invitation for bids (IFB) No. 69D-CSC-29-93, issued by the Department of Veterans Affairs (VA), for home oxygen services for VA beneficiaries living in various counties in Wisconsin, Northern Illinois and the Upper

Peninsula of Michigan. The protester contends that the agency improperly determined Lors to be responsible.<sup>1</sup>

We deny the protest.

The IFB was issued on September 26, 1992, contemplating a 1-year requirements contract beginning December 1 with an option for an additional year. Of the five bids received by the November 2 opening date, Lors's was low and HME's was next low.

The statement of work provided that the contractor had to be "JCAHO [Joint Commission on Accreditation of Hospital Organizations] accredited for home care." It further provided that VA personnel would inspect the contractor's facility prior to award for the purposes of determining responsibility.

Lors submitted evidence of its JCAHO accreditation with its bid listing its Roanoke Rapids, North Carolina facility. Lors also submitted a list of 21 references--all VA contracts--showing that it had performed similar services throughout the country. The VA checked a number of the references and concluded that performance had been successful; in particular, one of the references outside of North Carolina reported no problems with performance being principally handled from the Roanoke Rapids headquarters. During the reference check, the contracting officer discovered that a plant facility survey had been performed by VA officials at the North Carolina facility on October 30. A copy of the report of that survey was used to satisfy the solicitation requirement for a preaward survey.

During a preaward meeting, Lors was asked to describe its method of operation and the firm explained that it intended to set up one or more satellite warehouses for oxygen equipment in the service area and to coordinate all services through its North Carolina facility. Lors stated that this met with JCAHO's approval and that separate accreditation was not necessary for the satellite warehouse. JCAHO confirmed to the contracting officer that it was familiar with Lors's method of operation and that the accreditation

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<sup>1</sup>In its initial protest, HME also argued that the agency treated bidders unequally with respect to the availability of government-owned oxygen equipment for use during contract performance. The VA responded to this allegation in its agency report and the protester did not comment on the response. Therefore, we deem the issue abandoned and will not address it. Vanguard Research, Inc., B-242633; B-242633.2, May 30, 1991, 91-1 CPD ¶ 517.

of the North Carolina facility extended to services performed at remote locations.

Lors was awarded a contract on November 24.

HME argues that the VA acted in bad faith in determining Lors to be responsible. In this regard, HME argues that the VA knew that Lors did not have a JCAHO-accredited facility in the service area covered by the contract as required by the IFB. Further, HME argues that the VA failed to perform the required site visit at an accredited facility in the service area. Finally, HME--the incumbent contractor--argues that the VA modified its contract to require the firm to assist Lors during the month of December and argues that this shows that the agency knew at the time of award that Lors was not capable of fully performing as of the contract start date.

Because a contracting agency's determination that a particular bidder is responsible is based in large measure on subjective judgments, this Office generally does not review affirmative responsibility determinations. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1993). One exception to this rule is where a solicitation contains a definitive responsibility criterion, which is a specific, objective standard established by an agency to measure a bidder's ability to perform the contract. BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309. An accreditation requirement like the one here is a definitive responsibility criterion. Johnson & Wales College, B-200140, June 8, 1981, 81-1 CPD ¶ 456. Where, as here, an allegation is made that a definitive responsibility criterion has not been met, we will review the record to ascertain whether sufficient evidence of compliance has been submitted such that the contracting officer reasonably could conclude that the criterion has been met. BBC Brown Boveri, Inc., supra.

The record supports the VA's conclusion that Lors was JCAHO-accredited and capable of successful performance. The firm submitted its accreditation evidence with its bid and its status was confirmed with the accrediting organization. The references checked by the VA showed that the firm was successfully performing at a number of locations outside its Roanoke Rapids, North Carolina headquarters and, prior to award, JCAHO informed the contracting officer that it was familiar with Lors's method of operation and that the firm's accreditation extended to services performed at remote locations.

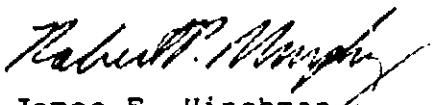
We do not agree with HME's interpretation of the solicitation as requiring an accredited facility within the contract service area. The definitive responsibility criterion set forth in the IFB contains no requirement regarding a particular service area; rather, it states that the contractor must be JCAHO accredited "for home care"-- i.e., the performance of the services required by the IFB. JCAHO has verified that Lors is accredited to perform these services at locations outside its North Carolina facility. We will not read solicitation provisions in a manner which restricts competition unless it is clear from the solicitation that such a restrictive interpretation is intended, JJH, Inc., B-247535.2, Sept. 17, 1992, 92-2 CPD ¶ 185, and we conclude that the record simply does not support HME's view that a contractor must have a separate accredited facility in Wisconsin, Illinois, or Michigan.

We also conclude that the agency acted reasonably in adopting the findings of a current, VA-conducted facilities survey performed at Lors's North Carolina location. Since that survey was made in the context of a contract for similar services and was performed after bids were opened under this IFB, we see no reason not to use it. Further, to the extent that HME argues that the survey was required of a facility located in the service area, we point out that there is simply no such requirement in the IFB.

Finally, HME argues that the fact that it was required to perform some home oxygen services during the month of December shows that the contracting officer knew that Lors was incapable of satisfactorily performing and therefore the responsibility determination was made in bad faith. We conclude that the protester's position is not supported by the record. The final modification to HME's contract requires HME to provide services needed for phasing out of the contract. This is consistent with the obligations set forth in the "Continuity of Services" clause in the protester's contract and does not necessarily indicate inability on Lors's part to successfully perform. Moreover, even if it turned out that Lors could not perform, that does not necessarily mean that the HME's argument has merit. A responsibility determination is based in large part upon subjective business judgments as to a firm's capability to perform. An affirmative responsibility determination is not a guarantee of faultless performance and the fact that a

contractor has performance problems does not show that the judgments which lead up to the responsibility determination were unreasonable or made in bad faith.

The protest is denied.

  
for James F. Hinchman  
General Counsel